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FOR BETTER OR WORSE: SURVIVING DIVORCE THROUGH ALTERNATIVE DISPUTE RESOLUTION

Teleicia J. Rose*

I. INTRODUCTION

The increase in the use and prevalence of arbitration agreements in commercial transactions has informed recent state legislative changes to family law procedures, specifically issues arising out of divorce proceedings.¹ The exponential increased use of arbitration in commercial and labor litigation has been attributed to the enactment of the Uniform Arbitration Act (UAA),² and the UAA has served as the framework for expanding the reach of arbitration into the area of family law. The UAA has been instrumental in the widespread use of arbitration. Thirty-five jurisdictions have adopted the UAA in its entirety; with another fourteen jurisdictions have enacting substantively similar legislation.³ In response to some particularized problems arising from the vagueness of the UAA and in an attempt to codify the vast amount of state decisional law interpreting both the UAA and the Federal Arbitration Act (FAA),⁴ the Revised Uniform Arbitration Act (RUAA) was promulgated in 2000.⁵ The RUAA is a modernized version of the UAA with expanded procedural provisions and thirteen states have adopted the RUAA in its entirety.⁶

Because of the incorporation of many common law principles, the RUAA provides an excellent template for the creation of a body of specialized arbitration law applicable to family law proceedings. Section 6 of the RUAA provides that parties may agree, through writing, to submit “any controversy” either present or future to arbitration.⁷ The language of section 6 of the RUAA is substantially similar to UAA section 1⁸ and FAA section 2.⁹ The breadth of the

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¹ See Thomas H. Oehmke & Joan M. Brovins, *Mediation and Arbitration of Family Law Disputes—Property, Support, Custody, and Family Time*, 118 AM. JUR. TRIALS 305, § 3 (2010); see generally Lynn P. Burleson et al., *Model Family Law Arbitration Act*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (March 12, 2005), available at <http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-1-10>; see generally George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521 (2008).

² UNIF. ARBITRATION ACT (1956) (hereinafter UAA)(*amended by* UNIF. ARBITRATION ACT §§ 1-33 (2000) (hereinafter RUAA).

³ RUAA, Prefatory Note (2009).

⁴ Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

⁵ RUAA, Prefatory Note.

⁶ See *Id.*; see also Walker, *supra* note 1, at 522 (“The RUAA, drafted to replace the UAA, now over a half century old, continues to gain acceptance among the states, albeit at a slower than expected pace.”).

⁷ RUAA, § 6.

⁸ UAA § 1 (“A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives.”).

language in the provisions of the RUAA allows for a broad application of arbitration. Moreover, the phrase “any controversy” seems to expand upon the FAA, which was originally intended only to cover commercial and maritime contracts.¹⁰ The breadth of controversies covered by RUAA section 6 arguably encompasses family law matters as well.¹¹ There is no express statutory provision exempting family law from the RUAA, however, there is also no express provision including family law.¹² Despite the lack of an explicit statutory directive, the use of arbitration in family law disputes has increased over the past thirty years.¹³

II. DIVORCE BY THE NUMBERS: THE USE OF ARBITRATION AGREEMENTS TO INCREASE THE EFFICIENCY, EQUALITY, AND ECONOMY OF DIVORCE

The virtues of arbitration that have made commercial and labor arbitration so attractive are also applicable to family law arbitration. The efficiency and neatness of reaching private agreements concerning disputes that relate to divorce such as alimony, child support, and asset allotment is especially enticing for parties who seek to conduct divorce proceedings in a civilized manner.¹⁴ Arbitration minimizes time, cost, and emotional expenses, features that make arbitration attractive to parties in family court proceedings. The use of arbitration is also attractive because of the level of privacy it offers. Unlike court proceedings which are kept on public record with an open policy that allows the public to attend court proceedings, arbitration is quite different. In arbitration proceedings the process is private, the arbitrator(s), through party consent,

⁹ 9 U.S.C. § 2 (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

¹⁰ 9 U.S.C. § 1; see Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1 (1996) (“During the past decade, the Supreme Court resoundingly endorsed the emergence of arbitration as a primary forum for the resolution of commercial disputes” in expanding the reach of the FAA the Court has “rejected several legal doctrines that limited the ability of parties to adopt and enforce commercial arbitration provisions contractually.”), see also *Southland Corp. v. Keating* 465 U.S. 1, 25 (1984) (“One rarely finds a legislative history as unambiguous as the FAA’s. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.”).

¹¹ See RUAA, Prefatory Note. (“It is likely that matters not addressed in the FAA are also open to regulation by the States.”). Seeing as that the scope of the FAA has been judicially expanded and has not explicitly exempted family law matters from its coverage, it is arguable that states are free to adopt regulations address the proper procedures for arbitrating family law disputes. *Id.* (Moreover, the RUAA does not expressly exempt disputes arising out of family law matters from the acts’ coverage and the act does not contain any public policy exception that would require exempting family law disputes.).

¹² See *Id.*

¹³ See *Barton v. Barton*, 715 S.E.2d 529 (N.C. Ct. App. 2011); Fla. Stat. § 44.1011 (2012) (authorizing judges to order all contested family law controversies to mediation); Tex. Fam. Code § 6.602 (2012) (granting the court authority to refer suits for the dissolution of marriage to binding mediation).

¹⁴ Arthur Mazirow, *The Advantages and Disadvantages of Arbitration as Compared to Litigation* (April 13, 2008), available at http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf (listing the following as advantages to arbitration: speedier resolution, cost effectiveness, relaxed rules of evidence, privacy of hearing due to the lack of a public record of the arbitration proceeding, expertise of arbitrators, and the informal nature of the proceedings).

can be sworn to confidentiality and the public is prohibited from attending the proceedings.¹⁵ Moreover, the juxtaposition of jurisdictional diversity, the fact intensive inquiry required by family law disputes, the proclivity the trial judges have towards parties reaching private settlements, and the expertise of an arbitrator with a background in family law will likely be more adapt to the sensitive and specific family law issues as compared to trial judges. In the face of emotionally wrought court proceedings, consent-based privately held arbitration proceedings are arguably more attractive than forced court mediation.¹⁶

Despite the overwhelming advantages of family law arbitration, there are also deficiencies in using arbitration to redress family law disputes.¹⁷ Since the vast majority of state and federal law concerning arbitration is intended to address the resolution of commercial disputes, there is no uniform law enacted or federalized to govern matrimonial arbitration.¹⁸ The lack of uniformity incentivizes forum shopping in favor of jurisdictions that have enacted arbitration statutes permitting the arbitration of family law disputes. Moreover, states which have not adopted specific legislation for family law arbitration and are permitting family law disputes to be submitted to arbitration under the RUAA or the UAA currently promulgated in that state face deficiencies in the statutory provisions and insufficient statutory authority to adequately address and adjudicate all the issues that arise in matrimonial cases.¹⁹

The obvious shortcoming of the current arbitration law, which does not explicitly include family law arbitration, illustrates the need for specialized and specific family law arbitration. Federal law announcing a public policy favoring family law arbitration and legislation specifically outlining the procedures governing family law arbitration is necessary to ensure enforcement of arbitration awards. Moreover, for family law arbitration to be attractive to parties, there must be some guarantee of finality. I argue that any federal or state legislation specifically permitting family law should include references to well settled precedent, contained in federal and state statutes, that arbitral awards are both binding and final,²⁰ thereby increasing the value of arbitration proceedings for the parties.

¹⁵ American Arbitration Association, GUIDE FOR EMPLOYMENT ARBITRATORS, 1997 WL 1530574, at 8 (July 1, 1997) (“One of the reasons parties resort to arbitration is their desire for privacy. You should therefore maintain the privacy of proceedings, unless both parties agree to open the hearings or unless a statute requires otherwise.”); *see, e.g.*, AAA Commercial R. 25 (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary.”).

¹⁶ *See* Mazirow, *supra* note 13.

¹⁷ *Id.* (listing the disadvantages of arbitration in general as compared to litigation; the disadvantages include but are not limited to : lack of certainty in the ruling because arbitrators may make an award based on justice and equality and not upon the rules of law necessarily, hidden fees of arbitration, and the lack of a jury).

¹⁸ *See* 9 U.S.C. § 2 (Family law is not a subject explicitly within the scope of the Act).

¹⁹ Less than a dozen jurisdictions have legislation for family law arbitration, often times these provisions are not explicit and exhaustive statutes, rather statutes concerning family law arbitration are merely added to the respective states’ versions of the UAA. *See* H. REV. STAT. ANN § 542:11 (1997); OKLA. STAT. ANN. TIT. 43, § 109H (WEST 2001); S.D. CODIFIED LAWS § 21-25B-2 (LexisNexis 2003 Pocket Supp.); TENN. CODE ANN. §§ 36-6-402(1), 36-6-409 (LexisNexis 2003 Supp.); TEX. FAM. CODE §§ 6.601, 153.0071 (Vernon 1998, 2002); WASH. REV. CODE §§ 7.06.020(2), 26.09.175 (West 1992, 2004 Cum. Ann. Pocket Pt.). *But see* Fla. Stat. Ann. § 44.104(1-14) (West 2003) (forbidding voluntary binding arbitration of child custody, visitation, or child support disputes).

²⁰ *See* sources cited *supra* note 15.

III. I DO, BUT I DON'T: ENFORCING ARBITRATION AGREEMENTS IN FAMILY LAW PROCEEDINGS

North Carolina has spearheaded this new caveat of arbitration through the development of comprehensive legislation permitting the use of arbitration in family law disputes, specifically disputes arising from divorce proceedings.²¹ Additionally, six states, including Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico, have enacted specific legislation addressing family law arbitration.²² Out of the seven states that have specific statutory provisions for family law arbitration, North Carolina has the most extensive legislation on the matter. So extensive, that in 2004 the American Academy of Matrimonial Lawyers Arbitration Committee used the North Carolina Family Law Arbitration Act as a template for the promulgation of the Model Family Law Arbitration Act.²³

A. North Carolina's Family Law Act (1999)

On October 1, 1999 North Carolina ushered in a new era of state legislation, which expanded the reach of arbitration. With the promulgation of the Family Law Act (FLAA) North Carolina became the first state to enact specific statutory provisions dealing extensively and exclusively with family law arbitration.²⁴ Since the enactment of the FLAA, Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico have followed suit, using the North Carolina Statute as fodder for the enactment of specific state legislation for family law disputes, specifically matrimonial arbitration.²⁵

Using the RUAA as a framework, the North Carolina legislature made concrete and specific changes and revisions to the UAA, melding the two to ultimately produce the FLAA. Noting the deficiencies in the application of laws on commercial arbitration to family law disputes, the North Carolina legislature made seven specific departures from the general state statute on arbitration. This piecemeal construction of the FLAA allowed the state legislature to tailor a law to meet the specific needs and unique disputes that arise out of family law. A particularly innovative aspect of the North Carolina statute is the finality and binding nature of family law arbitration agreements.²⁶ While the finality of arbitration agreements is common place in commercial arbitration disputes, this is the minority view amongst those states that have enacted family law arbitration statutes.²⁷ This lack of judicial review is a feature reserved from

²¹ North Carolina Family Law Arbitration Act, N.C. GEN STAT §§ 50-41–50-62 (West 2012), (herein after “N.C. FLAA.”).

²² See *supra* note 15.

²³ Prefatory Note, Model Family Law Arbitration Act, (2004).

²⁴ N.C. FLAA §§ 50-4–62.

²⁵ *Supra* note 15.

²⁶ See N.C. Gen. Stat. §50-42 (“During, or after marriage, parties may agree in writing to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. This agreement is valid, enforceable, and irrevocable except with both parties' consent, without regard to the justiciable character of the controversy and without regard to whether litigation is pending as to the controversy.”).

²⁷ See Conn. Gen. Stat. § 46b-66(b) (2010); Ind. Code Ann. § 34-57-5-10.

North Carolina's adaptation of the RUAA.²⁸ The majority view on matters governed by family law arbitration requires judicial review of all marital agreements, including arbitration agreements.²⁹

The North Carolina legislature specifically modified seven features of the RUAA which while applicable to commercial litigation would impede the use of arbitration in the family law context. The FLAA allows for modification of child custody or support settlements as well as alimony awards.³⁰ While modification seems to undercut the finality of an arbitration award, in family law matters it is especially important to allow for modification in select cases. Since determinations of custody, alimony, and other matters arising out of divorce require fact intensive inquiries, changes in circumstances require the ability to modify awards. For family law arbitration to be successful and to be purely a matter of process rather than a change of parties' substantive rights, the ability to modify the award is essential. While some features of the RUAA are not conducive to family law arbitration, others provide advantages to the family law arbitral process. One such feature retained from the RUAA is the accessibility of interim relief.³¹ This notion of interim relief embodies the necessary ability to modify awards.

While commercial arbitration, plagued with permissibly adhesionary contracts seems to disregard concepts of fairness, family law arbitration requires it. North Carolina made specific provisions that would promote fairness and transparency of the arbitral process. Section 50-51(b) requires arbitrators presiding over family law arbitration to issue written, reasoned awards.³² This provision is unlike commercial arbitration where parties who wish to receive a written and reasoned opinion of the proceedings must make specific and explicit provisions in the arbitration agreement requiring the arbitrator to provide written support and reasoning for the arbitral award.³³ This requirement of a reasoned award is especially important to family law arbitration because of the substantive inquiries that the arbitrator must grapple with. In family law cases the arbitrator is much more likely to make findings on substantive mixed issues of fact and law such as disputes over custody and support. Since the FLAA provides for modification of the arbitral award it is important that reviewing courts have a sufficient record for review in order to make informed determinations concerning modification, confirmation, or vacatur. Another party

²⁸ See NC Gen. Stat. § 1-569.24 (2011); *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 355 S.E.2d 815 (1987) ("The purpose of arbitration is to reach a final settlement of disputed matters without litigation. Parties who have agreed to submit disputes to arbitration have also agreed to abide by the decision rendered by the arbitrator. Because of the finality and binding nature of arbitration agreements, generally, parties will not be allowed to be attack the regularity or fairness of the arbitral award through judicial recourse.").

²⁹ See Del. Fam. Ct. Civ. R. 16.1(a) (binding arbitration is permitted for child support determinations but is prohibited for matters concerning both custody and visitation); *Carole Ann Masters v. Samuel Saunders Masters*, 513 A.2d 104, 112 (Conn. 1986).

³⁰ The FLAA allows for the modification of awards, in selected circumstances, for alimony, post-separation support, child support, or child custody in the event of a substantial change in circumstances. See NC Gen. Stat §§ 50-56.

³¹ "The arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy... A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy." See NC Gen. Stat. § 1-569.8(b)(1)-(2). Parties may seek interim relief from either the arbitrator or the court. The forms of interim relief include: an order of attachment or garnishment of wages, temporary restraining orders, preliminary injunctive relief, etc. See NC Gen. Stat. § 50-44(a), (b), (c)(1)-(6).

³² NC Gen. Stat. § 50-51(b).

³³ See *Legion Ins. Co. v. Insurance Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987); *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988).

conscious legislative decision made by North Carolina concerns the number of arbitrators. In the FLAA, the North Carolina legislature was cost conscious—paying particularly close attention to the economic toll of arbitration on separating couples. As such, the FLAA mandates a sole arbitrator as the default rule for family law arbitration.³⁴ The sole arbitral default rule makes arbitration less expensive than the traditional three person arbitral panel utilized as the default rule in commercial arbitration.³⁵ This modification of the UAA is a practical one. Requiring a three member panel would make family law arbitration unaffordable and impractical to most middle class and low income parties.

Under the FAA the grounds for vacatur are limited, and prohibit merits review,³⁶ however, under the FLAA two modifications are inextricably intertwined: vacatur based on the arbitral award being volatile of the legal standard of the best interest of the child and merits review of the arbitral award.³⁷ The FLAA permits merits review of child custody determinations, by motion of a party, based on the grounds that the arbitrator's determination of custody was not in the best interest of the child.³⁸ The best interest standard is the current test for determining which parent or parent(s) will be awarded legal and physical custody of a child in a custody dispute.³⁹ Because the initial determination of custody is a substantive issue addressed by the arbitrator, the FLAA's provision permitting vacatur in cases where the best interest standard has not been met is a license for courts to engage in merits review.⁴⁰ There is a palpable public versus private tension in this section of the FLAA. Allowing for vacatur on this ground reflects the state's interest and responsibility to oversee the welfare of children within its jurisdiction.

The final substantive difference in the North Carolina statute and general federal and state statutes governing commercial arbitration is the “carve out” concerning prenuptial agreements containing arbitration agreements regarding child issues.⁴¹ Section 50-42 of the FLAA states that prenuptial agreements regarding child support or child custody are neither binding nor enforceable.⁴² This exemption is reasonable because the resolution of child custody and support issues are fact intensive inquiries and events that occur throughout the marriage have direct bearing on determining what is in the best interest of the child.⁴³ The thoroughness and overall comprehensive nature of the FLAA has also served as the framework for the Model Family Law Arbitration Act of 2004, subsequently promulgated by the American Academy of Matrimonial Lawyers.

³⁴ NC Gen. Stat. § 50-45(a).

³⁵ See 9 U.S.C. §§ 1–16 (generally).

³⁶ Vacatur appropriate in limited situations including fraud, corruption, lack of disclosure by the arbitrator, or where the arbitrator exceeds his authority. See 9 U.S.C. § 10 (2010); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 584 (2008).

³⁷ See NC Gen. Stat. § 50-54(a)(6).

³⁸ *Id.*

³⁹ See UNIF. MARRIAGE AND DIVORCE ACT § 402, cmt. (stating that the best interest of the child is the prevailing custody standard in jurisdictions throughout the United States).

⁴⁰ See RUAA (generally); UAA (generally) (Neither the UAA or the RUAA permits substantive—merits—review of arbitral awards).

⁴¹ NC Gen. Stat. § 50-42(a).

⁴² *Id.* (“Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship.”).

⁴³ See UNIF. MARRIAGE AND DIVORCE ACT § 402 (listing factors to be considered in determining custody, no factor is determinative).

B. The Model Family Law Arbitration Act

Five years after North Carolina enacted a substantive family law arbitration statute, the American Academy of Matrimonial Lawyers Arbitration Committee utilized that very statute as a framework to promulgate the Model Family Law Arbitration Act (MFLAA). Having the similar legal affect of a Restatement of Law the MFLAA is essentially a guideline for states interested in adopting their own legislation regarding family law arbitration. Much like North Carolina's FLAA, the MFLAA is patterned after the RUAA and makes specific provisions that cater to the unique needs and nature of family law disputes. Similar to the intentions of the FAA, the MFLAA is merely procedural and not intended to alter any substantive law.⁴⁴

In section 101(a) the MLAA clearly states the purpose for the legislation; announcing a policy of permitting the use of arbitration of all family law disputes arising from marital separation or divorce.⁴⁵ As a model act intended to be adopted by the respective states, similar to the RUAA, the MLAA specifies that arbitration under it is intended to be performed pursuant to the family law litigation of the particular state.⁴⁶ Much like the FAA, RUAA, and the FLAA the primary purpose of the MLAA is to ensure that agreements to arbitrate family law disputes are both valid and enforceable.⁴⁷ Sections following section 106 of the MLAA borrow heavily from the language used in the FAA, with provisions for arbitrator disclosure and neutrality as well as guidelines for enforcement or vacatur of arbitral awards.⁴⁸

IV. CONCLUSION

The adoption of specific family law arbitration statutes has been neither quick nor widespread. The lack of immediate acceptance of this form of arbitration is not surprising. The current state of family law nationwide is rather disjointed. Based on traditional notions of state sovereignty and constitutional concepts federalism, each respective state has a compelling state interest in promulgating rules and regulations that protect children, promote the well-being of the family, and protect the privacy of the family.⁴⁹ The statutes adopted by Colorado, Connecticut, Indiana, Michigan, New Hampshire, New Mexico, and North Carolina represent the level of specificity required to enact successful legislation as guidelines for family law arbitration. While every case may not be appropriate for submission to family law arbitration, the availability of alternative dispute resolution for family law issues is a natural caveat for the traditional subject matters covered by commercial arbitration. Through the correct modifications the arbitration of

⁴⁴ Lynn P. Burleson et al., Model Family Law Arbitration Act, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (March 12, 2005), available at <http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-1-10> (“[The MFLAA] offers an additional procedure for resolving family law issues besides, *e.g.*, litigation, settlement, mediation, collaborative procedures or other alternative dispute resolution (ADR) techniques.”).

⁴⁵ MFLAA § 101(a).

⁴⁶ *Id.*

⁴⁷ See MFLAA § 106(a); 9 U.S.C. § 2.

⁴⁸ See MFLAA (generally); see also 9 U.S.C. §§ 1–16 (2010) (case law and the comments to the statutory provisions are helpful in interpreting the intent of the MFLAA).

⁴⁹ U.S. CONST., Amend. X (1791) (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

private matters can be a successful recourse for parties grappling with the difficult emotional and financial burdens of divorce or marital separation.